

1 Larry A. Hammond, 004049
2 Anne M. Chapman, 025965
3 OSBORN MALEDON, P.A.
4 2929 N. Central Avenue, 21st Floor
5 Phoenix, Arizona 85012-2793
6 (602) 640-9000
7 lhammond@omlaw.com
8 achapman@omlaw.com

9 John M. Sears, 005617
10 P.O. Box 4080
11 Prescott, Arizona 86302
12 (928) 778-5208
13 John.Sears@azbar.org

14 Attorneys for Defendant

15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339

) Div. 6

) **REPLY IN SUPPORT OF**
) **MOTION TO PRECLUDE**
) **DETECTIVES PAGE AND**
) **KENNEDY FROM TESTIFYING**
) **AS EXPERTS, OBJECTION TO**
) **QUALIFYING ADDITIONAL**
) **EXPERTS AND MOTION TO**
) **COMPEL STATE TO MAKE A**
) **PROFFER REGARDING**
) **WITNESSES**

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23
24 The State completely fails to address both the untimely designation of its newly
25 listed "experts" Detective Page and Detective Kennedy and its previous disavowal of
26 their expertise. The timing of the disclosure of these witnesses as experts should result
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1 in their exclusion. Furthermore the now purported areas of expertise for these witnesses
2 are not relevant and are duplicative. The State also attempts to have yet another late
3 disclosed witness designated as an expert. The Court should prohibit this. And finally,
4 the Court should require the State to make a proffer for several of its listed 141 lay
5 witnesses.

6 ARGUMENT

7 **1. The State Should Be Prohibited from Offering Expert Testimony from** 8 **Detective Page.**

9 The State's failure to timely disclose Detective Page as an expert and its previous
10 representation to counsel and the Court that Detective Page was not being offered as an
11 expert should lead to his exclusion. Detective Page was not disclosed as an expert until
12 less than three and a half months prior to trial. The State previously represented that
13 Detective Page would not be called as an expert and would not offer any expert
14 opinions. Under Rule 15.7 the court "must order disclosure and impose sanctions
15 unless it finds that the failure to disclose was harmless, or could not have been
16 disclosed earlier even with due diligence and the information was disclosed
17 immediately upon discovery." *See State v Newell (Milagro)*, 221 Ariz. 112, 210 P.3d
18 1283 (1 CA-SA 09-0052, Court of Appeals filed June 2, 2009).

19 The State has not argued that the failure to timely identify Page as an expert was
20 harmless or that it could not have done so earlier. The State's complaint that the
21 defense has not attempt to interview Detective Page is a foil. The Defense has asked the
22 State innumerable times to arrange for interviews of the State's witnesses. The defense
23 has asked this Court for assistance in setting up those interviews. Furthermore, until
24 January of 2010 the defense was told Page was not an expert. To add to the
25 frivolousness of State's argument about the defense failure to interview Page, no
26 computer forensic reports were even provided to the defense by the State until February
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1 of 2010. Detective Page should be excluded based on the State's failure to timely
2 disclose him as an expert.

3 Detective Page should also be excluded because his proffered testimony is not
4 relevant, is duplicative, and he is not qualified to offer it. The State has failed to
5 demonstrate how Detective Page's purported expertise in "how the electronically stored
6 information was extracted from the various electronic devices for later forensic
7 analysis" and "about the software that was used to extract forensic evidence from the
8 digital evidence" is relevant. Detective Page should not be permitted to waste the Court
9 and jury's time with testimony that the State has not demonstrated has any relevance.
10 The State has also not attempted to explain why its four other computer forensic experts
11 cannot testify, if the Court determines that it is relevant, about how the extraction of
12 evidence they reviewed took place.

13 Most significantly, the State has failed to demonstrate how Mr. Page is qualified as
14 an expert on the issue of evidence extraction. However, Detective Page's own prior
15 testimony establishes that he is not qualified as an expert in this area. His testimony is
16 that he has taken courses on software used for examination and two courses by the
17 "National White Collar Crime Center." (Tr, 10/28/09 at 75-76). The State has not
18 indicated which classes, by what institutions, for how long, on what dates Detective
19 Page took these classes. Nor has the State identified when or where Detective Page has
20 elsewhere been qualified as an expert on this or any issue relating to computer forensics.
21 The State has failed to demonstrate how Detective Page is competent to offer any expert
22 opinions on computer forensics or how any of his opinions would be helpful to a jury.
23 His testimony should therefore be excluded.

24 Also relevant to the Court's determination is the fact that the State only disclosed in
25 February of 2010 the computer forensic reports, even though the electronic devices that
26 were the subject of the reports have been in the possession of the State for well over a
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1 year. The State's late disclosure has substantially interfered with Mr. DeMocker's
2 ability to identify appropriate experts or prepare his defense. In the State's disclosure
3 about what materials Mr. Echols will rely on, it provides "Emails obtained by DPS
4 Computer Forensics Lab" without identifying these documents. The State's disclosure
5 with regards to computer forensic examinations and now late disclosure of a new fifth
6 expert has seriously impeded Mr. DeMocker's ability to prepare for trial.

7
8 **2. The State Should be Prohibited from Offering Expert Testimony from**
9 **Detective Kennedy.**

10 The State's response also fails to acknowledge or address its late disclosure of
11 Detective Kennedy as an expert. Detective Kennedy should be excluded because she
12 was not disclosed as an expert until less than three and a half months before trial and
13 she is not qualified as a shoe print tracking expert. Detective Kennedy should be
14 excluded as an expert under Rule 15.7. The State again has argued that her late
15 disclosure was harmless or that it could not have so disclosed Detective Kennedy with
16 reasonable diligence. The prejudice from the late disclosure was outlined in the motion
17 and not refuted by the State. The defense was not previously able to identify, retain and
18 research the area of shoe tracking because it was not aware this was even an issue.
19 Suddenly, three months before trial, the State has identified two new experts in this
20 area. This surprise, with evidence that the State failed to properly preserve, seriously
21 effects Mr. DeMocker's ability to allocate resources and prepare for trial in three short
22 months.

23 Furthermore, Detective Kennedy is not qualified as a shoe tracking expert. The
24 State's response asserts that Detective Kennedy's training in "tracking humans"
25 somehow qualifies her to offer opinions about two sets of shoe prints that were found on
26 the scene and opine that "[t]he victim's shoes matched the first set of shoe prints. The
27 second set of shoe prints were identified as a hiking type boot print." The State's

1 response also discusses differences between the two sets of tracks and asserts that her
2 expertise is in "identifying a specific set of tracks." The State concludes "the difference
3 between the two sets of tracks is a distinct difference that any ordinary person would be
4 able to perceive."

5 Detective Kennedy has no training in making shoe print comparisons or identifying
6 differing sets of tracks. Her training in tracking people is not related to shoe print
7 comparison or in identifying shoe prints or markings. During Detective Kennedy's
8 December 2, 2009 interview she acknowledged that her training "doesn't make me an
9 expert." The State's response does not indicate any training she received in identifying
10 tracks or differentiating between multiple tracks and appears to confuse training in
11 tracking humans with training in identifying shoe prints or making comparisons.
12 Detective Kennedy is not qualified to offer any opinions on the shoe prints at issue in
13 this case.

14 In addition to this, the State's own assertion that an ordinary person can perceive the
15 difference between the tracks belies its argument that Detective Kennedy is an
16 appropriate expert. Rule 702 permits an expert to testify on matters that require
17 scientific or technical knowledge. If an "ordinary person" can make a decision on the
18 two sets of tracks, that issue is one properly left to the jury and not the proper subject of
19 an expert, assuming Detective Kennedy was qualified. For these reasons, Detective
20 Kennedy should be excluded as an expert witness.

21 **3. Other Purported Experts**

22 Commander Mascher was not disclosed as an expert until February 1, 2010,
23 nearly three months before trial. Commander Mascher was identified as a fact witness
24 on June 5, 2009. Prior to the end of January 2010, the State had not disclosed any
25 "tracking expert." The State's failure to disclose these "experts" has impeded the
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1 defenses ability to prepare for trial, retain appropriate experts, conduct necessary
2 investigation and perform needed defense interviews in this area.

3 The State has not explained why this late disclosure was made, nor has it
4 attempted to describe such a late disclosure as harmless. Pursuant to Rule 15.7,
5 Commander Mascher's testimony as an expert should be excluded.

6 The State's proffer of Commander Mascher's expertise is also insufficient to
7 qualify him as an expert. Commander Mascher's experience as a "hunting guide" does
8 not qualify him to opine on shoe print identification, comparison or other issues that the
9 State has indicated it intends to offer through its newly identified "tracking" experts.

10 Finally, the State has not explained why any testimony from Commander
11 Mascher would not be duplicative of any testimony from Detective Kennedy if either of
12 them were qualified as an expert. Commander Mascher's testimony should be
13 excluded.

14 With respect to Roger Hoover, Paul Lindvay, Patrick Smith and Randy Arther,
15 the defense looks forward to a hearing wherein the training, skill, education, experience
16 and knowledge of these proposed experts can and will be tested and explored.

17 4. State's Witnesses

18 As of February 1, the State still has 141 witnesses on its witness list in addition
19 to 25 experts. Rule 15.1 requires the State to disclose the names and addresses of all
20 witnesses it intends to call together with their statements. The defense has objected in
21 separate motions to some of these witnesses based on the late disclosure by the State.
22 The Court has previously directed the State to narrow its witness list to those it intends
23 to call at trial. The State has indicated at recent hearings that it has not yet done so. The
24 State has removed witnesses and then put them back on the list without explanation.
25 Counsel have been attempting, with little success, to schedule interviews of the State's
26 witnesses. Given the short time to trial, the State's extensive witness list, the limited
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1 resources of the defense, and the recent *in limine* and other rulings of the Court, the
2 defense asks this Court to require the State to make a proffer as to the following
3 witnesses proposed testimony. The defense either has not received disclosure sufficient
4 to have any idea of the proposed testimony of the witness, in violation of Rule 15.1, or
5 the provided disclosure is sufficient to call in to question the relevance or admissibility
6 of the listed witnesses' likely testimony.

- 7
- 8 a. David Soule- Mr. Soule was the boyfriend of Ms. Kennedy at the time of her
9 death who lived in Maine. The prosecution has indicated he will testify based
10 on "personal knowledge."
 - 11 b. Debbie Hill – Ms. Hill was a friend of Ms. Kennedy's and the prosecution has
12 indicated she will testify as to her "personal knowledge."
 - 13 c. Sally Butler – Ms. Butler was a friend of Ms. Kennedy's and the prosecution
14 has indicated she will testify as to her "personal knowledge."
 - 15 d. Jana Johnson – Ms. Johnson's interview suggests she saw someone else on a
16 bike in the area on July 2, 2008.
 - 17 e. Dr. Diane Cornsweet - Dr. Cornsweet was Ms. Kennedy's doctor who last
18 saw her on June 13, 2008.
 - 19 f. Cody Anne Buchser – Ms. Buchser is identified by the State as Mr.
20 DeMocker's real estate agent.
 - 21 g. Nikki Check – Ms. Check was a former house-sitter of Ms. Kennedy's who
22 had not seen her since January 2008.
 - 23 h. Sean Bailey – Mr. Bailey is Ms. Girard's son and is identified by the State as
24 testifying to "personal knowledge."
 - 25 i. Morgan Jay – Mr. Jay is listed as testifying to "personal knowledge."
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- 1 j. Mike Bueler – Mr. Bueler is identified as a custodian of records for Mr.
2 DeMocker’s “Great Expectations” on-line dating account. This information
3 is not relevant.
4
5 k. Debbie Detman – Ms. Detman is identified as testifying about the insurance
6 policies from Hartford Life Insurance. This information is not relevant.
7
8 l. Debbie Kasprzak – Ms. Kasprzak is identified as working at RMIN and
9 having “personal knowledge.”
10
11 m. Lynn Shoopman – Ms. Shoopman is listed with no address and is identified
12 as having “personal knowledge.”
13
14 n. Debbie Sims – Ms. Sims is listed with no address and is identified as having
15 “personal knowledge.” No disclosure has been provided regarding Ms. Sims.
16
17 o. Terry Sims – Mr. Sims is listed with no address and is identified as having
18 “personal knowledge.” No disclosure has been provided regarding Mr. Sims.
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20 p. Dr. Fred Markham – Dr. Markham is identified as having “personal
21 knowledge.”
22
23 q. Catherine Peterson - Ms. Peterson is listed with no address and is identified as
24 having “personal knowledge.” No disclosure has been provided regarding
25 Ms. Peterson.
26
27 r. Tommy Meredith – Mr. Meredith is listed with no address and is identified as
28 having “personal knowledge.”
s. Sturgis Robinson – Mr. Robinson is listed with no address and is identified as
having “personal knowledge.” Mr. Robinson is believed to have last worked
with Mr. DeMocker in approximately 2003.
t. Jill Dyer - Ms. Dyer is identified as the custodian of records regarding
Charlotte DeMocker’s application for social security. This is not relevant.

- 1 u. Dr. Bill Rubin – Dr. Rubin was Mr. DeMocker’s therapist and is identified as
2 having “personal knowledge.” His testimony would be protected by the
3 doctor - patient privilege and is not relevant.
- 4 v. Carol Tidmaret – Ms. Tidmaret is listed without an address. Counsel assume
5 this is Carol Tidmarsh. She is identified as having “personal knowledge.”
6 Based on the Court’s *in limine* rulings, her testimony is not believed to be
7 relevant.
- 8 w. Michael Wineberg – Mr. Wineberg is listed with no address and is identified
9 as having “personal knowledge.”
- 10 x. Don Wood – Ms. Wood is listed with no address and is identified as having
11 “personal knowledge.”
- 12 y. Jeff Zyche – Mr. Zyche is listed with no address and is identified as having
13 “personal knowledge.”
- 14 z. Deane Shank – Mr. Shank is listed with no address and is identified as a
15 “rebuttal” witness.
- 16 aa. Richard Ach – Mr. Ach is listed with no address and is identified as having
17 “personal knowledge.” In addition to being disclosed late, Mr. Ach’s last
18 meaningful contact concerning Mr. DeMocker was apparently in 2005.

19 **CONCLUSION**

20 Defendant Steven DeMocker, by and through counsel, hereby requests that this
21 Court prohibit the State from offering any expert testimony from either Detectives Page
22 or Kennedy or Commander Mascher. Counsel also request that this Court hold a
23 hearing to determine if the other State identified experts are qualified. Finally, counsel
24 request that the Court order the State to make a proffer with respect to the witnesses
25 identified above.

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1 DATED this 17th day of February, 2010.

2
3 By: 

4 John M. Sears
5 P.O. Box 4080
6 Prescott, Arizona 86302

7 OSBORN MALEDON, P.A.
8 Larry A. Hammond
9 Anne M. Chapman
10 2929 N. Central Avenue, Suite 2100
11 Phoenix, Arizona 85012-2793

12 Attorneys for Defendant

13 **ORIGINAL** of the foregoing
14 filed this 17th day of February, 2010, with:

15 Jeanne Hicks
16 Clerk of the Court
17 Yavapai County Superior Court
18 120 S. Cortez
19 Prescott, AZ 86303

20 **COPIES** of the foregoing hand delivered this
21 this 17th day of February, 2010, to:

22 The Hon. Thomas B. Lindberg
23 Judge of the Superior Court
24 Division Six
25 120 S. Cortez
26 Prescott, AZ 86303

27 Joseph C. Butner, Esq.
28 Prescott Courthouse basket

